Supreme Court, U.S.
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NO. 97-91

In the Supreme Court of the United States

October Term, 1997

JAMES FRONKO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether application of the arson guideline pursuant to U.S.S.G. Section 2K1.4(a)(1) to enhance a defendant's sentence for a conviction of mail fraud when the offense of arson was never charged or proven at the time of trial, and which substantially enhanced the defendant's sentence, requires proof by clear and convincing evidence at the fact finding determination at sentencing to comport with the Due Process Clause of the Fifth Amendment?

2. Whether the introduction of a medical authorization, not involving a claim for insurance, requested by the insurance company through its attorney, and sent through the United States mails by the Petitioner, is a sufficient mailing within the confines of 18 U.S.C. Section 1341?

PARTIES

In the United States Court of Appeals for the Third Circuit, Petitioner, James Fronko, was the sole Appellant.

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This case is an example of a conflict which currently exists among the circuits as to which burden of proof the government must be held to when introducing uncharged misconduct under alternate guidelines to enhance a criminal defendant's sentence beyond the maximum range for an underlying conviction. This case also brings forth the issue whether a citizen can become a defendant in any federal prosecution by simply mailing a wholly tangential article of no bearing to an insurance claim requested by an insurance company making an insurance claimant into a potential defendant.

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In the Supreme Court of the United States

October Term, 1997

JAMES FRONKO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on April 14, 1997.

CITATIONS TO OPINION BELOW

The Memorandum Opinion of the Court of Appeals is not reported and is reprinted in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

18 U.S.C. Appx. Section 2F1.1, comment note 13., as here applicable, provides:

> Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. Section 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which Section 2S1.3 would be more apt, and false statements to a customs officer, for which Section 2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in Section 1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than Section 2F1.1. Otherwise, in such cases,

> Section 2F1.1 is to be applied, but a departure from the guidelines may be considered.

The remaining statutory provisions involved are 18 U.S.C. Appx. Section 2K1.4(a)(1) and 18 U.S.C. Section 1341.

STATEMENT OF THE CASE

On April 8, 1994, a fire occurred at the single-family dwelling residence of the Petitioner, James Fronko (hereinafter referred to as "Fronko"). On September 20, 1995, the United States Government indicted Fronko on one count of possession of a destructive device in violation of 26 U.S.C. Section 5845(a)(f), Section 5861(d) and mail fraud under 18 U.S.C. Section 1341. The district court had jurisdiction pursuant to 18 U.S.C. 3231.

On February 2, 1996, Fronko's Pretrial Motions were heard by the Honorable William L. Standish. Fronko had filed a Motion to Dismiss, the substance of which was that a prosecution of wholly-local concern, i.e., an arson case of a principal residence, under the rubric of a federal crime, i.e., possession of a destructive devise and mail fraud, was a

selective prosecution. On February 2, 1996, the court denied Fronko's Motion to Dismiss.

On March 25, 1996, a trial of this matter occurred. At the conclusion of the Government's case in chief, Fronko moved for a judgment of acquittal as to the charges of possession of a destructive device and mail fraud. On March 28, 1996, the jury returned verdicts of guilty to possession of a destructive device and mail fraud. Thereafter, Fronko again moved the court for a judgment of acquittal as to both counts. The court granted Fronko's Motion as to the possession of a destructive device and denied Fronko's Motion as to the mail fraud.

On July 26, 1996, Fronko was sentenced to a term of 51 months by the court. Even though Fronko was convicted of mail fraud and the applicable guideline was 15 to 21 months, the court applied the guideline offense for a conviction of arson as the relevant conduct in determining the sentence in the matter, which increased Fronko's guideline range of imprisonment to 51 to 63 months.

Upon timely appeal of this conviction, the Third Circuit affirmed Fronko's conviction and sentence and held that (1) the mailing of the medical release authorization form

to the Allstate Insurance Company was an essential part of a scheme to defraud and was sufficient to violate the federal mail fraud statute; and (2) the district court's application of the arson guideline pursuant to U.S.S.G. Section 2K1.4(a)(1) to enhance Fronko's sentence for mail fraud was appropriate under U.S.S.G. Section 2F1.1, comment note 13.

This Petition then followed the issuance of the Memorandum Opinion of the United States Court of Appeals for the Third Circuit, dated April 14, 1997.

REASON FOR GRANTING THE WRIT

This case is an example of a conflict which currently exists among the circuits as to which burden of proof the government must be held to when introducing uncharged misconduct under an alternate guideline to enhance a criminal defendant's sentence beyond the maximum range for the underlying conviction. The issue is of significant importance because there is no uniform standard of when the burden of proof switches from a preponderance of the evidence to the higher, more difficult standard of clear and convincing evidence. Depending on which circuit in which a criminal proceeding is pending, and depending on a very subjective

analysis of what constitutes a "significant" or "extraordinary" upward enhancement based upon uncharged or acquitted "relevant conduct", certain defendants will be denied due process and equal protection of the law because defendants who have committed similar crimes under similar circumstances can be sentenced inconsistently as the government can be put to a different standard of proof when introducing uncharged misconduct to enhance a defendant's sentence.

This Court upheld the threshold preponderance standard in McMillen v. Pennsylvania, 477 U.S. 79 (1986). In McMillen, this Court intimated that the use of the preponderance of the evidence standard satisfies due process where there is no allegation that the sentencing enhancement was not "a tail which wags the dog of the substantive offense". Id. at 88. This Court recently revisited the issue in United States v. Watts, 519 U.S. _____, 136 L.Ed.2d. 554 (1997), where the per curiam opinion stated "we have held that application of the preponderance standard at sentencing generally (emphasis added) satisfies due process." Id. 564, citing McMillen, 477 U.S. 79, and Nichols v. United States, 511 U.S. 738 (1994). Moreover, this Court

acknowledged the divergence of opinion among the circuits as to whether, in extreme circumstances, the clear and convincing standard should be applied, but declined to address the issue. United States v. Watts, 136 L.Ed.2d. 554 Presently, under the holdings of McMillen, Nichols, and Watts, the circuits are left with no guidance on when to apply the higher standard, only that in certain circumstances, it would be appropriate. This subjective, pro hoc approach undermines the purpose and spirit of the sentencing guidelines in promoting uniformity in sentencing and instead causes sentencing disparity.

The disparity in sentencing is exemplified by comparing the present case to the earlier Third Circuit case of United States v. Kikumura, 918 F.2d 1084 (3d. Cir.1990). Kikumura is a precedent of continuing importance because the Court recognized that due process is not satisfied with a preponderance standard at the sentencing fact finding stage in certain cases.

In Kikumura, the district court departed from the sentencing guidelines and issued a sentence which resulted in a twelve-fold increased enhancement of the defendant's sentence. The Third Circuit reduced the sentence on appeal

and concluded, that an appropriate eight-fold increase was appropriate and that the radical upward enhancement required application of the clear and convincing standard for fact finding at the sentencing phase. Id. The Third Circuit reduced the defendant's sentence after finding a twelve-fold increase "radical", and concluded that in that particular case, the clear and convincing standard should apply.

In the present case, the Third Circuit summarily affirmed the defendant's conviction and sentence for mail fraud that was enhanced by the federal arson guideline. The District Court concluded that Fronko's offense was "more aptly covered by another guideline, Section 2F1.1, (n.13), namely, the Arson Guideline, Section 2K1.4" United States v. Fronko, No. 96-3229 - at 8 (3d.Cir. 1997).

In affirming the sentence, the Court never addressed which burden of proof was appropriate at fact finding, despite the fact that Fronko's sentence was enhanced by thirty months under the Arson Guideline. This is a significant departure which requires application of the clear and convincing standard during the fact finding phase at sentencing because the conduct which enhanced the

defendant's sentence was uncharged criminal misconduct that was never proven at the criminal trial.

The uncertainty of which standard of proof applies at the fact finding determination at sentencing is also apparent in the other circuits. For example, in United States v. Townley, 929 F.2d 365 (8th Cir. 1991), the Court of Appeals, when confronted with a sentencing enhancement challenge, cited this Court's opinion in McMillen, and intimated that a seven-fold increase in the defendant's sentencing range might require proof at sentencing by more than a preponderance of the evidence. United States v. Townley, 929 F.2d at 369. The issue was not decided by the Eighth Circuit because it had concluded that the government had not even met the preponderance standard in that particular case.

The Seventh Circuit has also left open the possibility of using the clear and convincing standard in situations where there is a significant enhancement in a defendant's sentencing range. In United States v. Trujillo, 959 F.2d 1377 (7th Cir. 1992), the Court embraced this possibility and concluded that "the sentencing-hearing tail must wag the substantive-offense dog in order for the preponderance of the evidence standard to violate due process." Id. citing United States v. Kikumura.

The Court further concluded that it had given its approval of the Kikumura holding in its earlier decision in United States v. Schuster, 948 F.2d 313 (7th Cir. 1991).

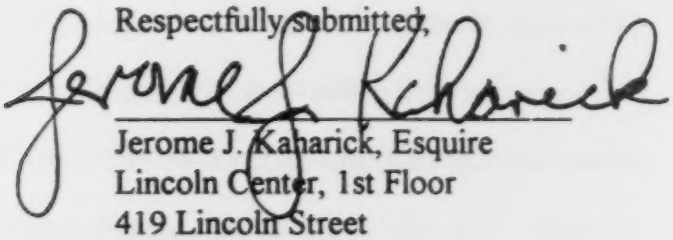
What the Circuit Courts are left with is their own subjective interpretation of when "the tail is wagging the substantive-offense dog" for sentencing enhancement purposes. The lack of guidance in this area has created chronic uncertainties as to when due process requires the higher burden of proof risking chaos in every federal criminal case in which a defendant's sentence is significantly enhanced by uncharged, relevant conduct under the sentencing guidelines. The Courts are left to struggle with which burden of proof the government must prove when introducing uncharged relevant conduct to significantly enhance a defendant's sentence for an underlying conviction. Courts are left guessing when due process requires the government to prove certain relevant conduct by the clear and convincing standard, and the result is inconsistent sentencing, unequal treatment among similar defendant's that have committed similar acts under similar circumstances, and a denial of due process in situations where the clear and convincing standard should have been applied.

Finally, the mailing that the Government used to meet its burden of proof that Fronko intentionally devised a scheme to defraud and used the mails in furtherance of that scheme is the mailing requested by the insurance company's attorney for a medical authorization form that ultimately had nothing to do with the claim that Fronko made for the contents that were lost in the fire that occurred at his residence. The United States mails did not play an integral part, but rather only a tangential or incidental role in any alleged fraudulent scheme. As such, the mailing relied upon by the Government to show mail fraud is insufficient to prove the Government's case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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July 11, 1997

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3229

UNITED STATES OF AMERICA
vs.
JAMES FRONKO

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Criminal No. 95-00023J)
District Judge: Honorable William L. Standish

Submitted under Third Circuit LAR 34.1(a)
March 14, 1997

BEFORE: MANSMANN, LEWIS and MICHEL*,
Circuit Judges.
(Filed April 14, 1997)
MEMORANDUM OPINION OF THE COURT

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* The Honorable Paul R. Michel, United States Circuit Judge for the Federal Circuit, sitting by designation.

LEWIS, Circuit Judge.

The primary question we are asked to decide is whether a medical release authorization form sent via the United States Postal Service by the Appellant to his insurance company is a sufficient mailing for the purposes of 18 U.S.C. §1341, the mail fraud statute. The district court found that it is sufficient. We agree and will affirm.

I.

In January, 1994, Appellant James Fronko obtained an Allstate Insurance Company homeowner's insurance policy for his home in Johnstown, Pennsylvania. In April, 1994, Fronko's home was set on fire. A few months later, Fronko was admitted to a hospital after he threatened to commit suicide.

As part of its investigation of Fronko's insurance claim, Allstate requested a medical release authorization form from Fronko to determine whether the medical records indicated a connection between the fire and Fronko's hospital admission. In September, 1994, Fronko mailed a signed medical release authorization form to Allstate Insurance via the United States Postal Service. If Allstate had not received this signed form, it might have denied Fronko's claim.

In September, 1995, a federal grand jury in the Western District of Pennsylvania returned a two count indictment charging Fronko with (1) possession of a destructive device, in violation of 26 U.S.C. §§5845(a), (f) and 5861(d), and (2) mail fraud, in violation of 18 U.S.C. §1341.

On October 16, 1995, Fronko entered a plea of not guilty. On March 28, 1996, following a three day jury trial, Fronko was found guilty on both counts. The district court set aside the jury's verdict on the first count.

Although Fronko's Presentencing Report ("PSR") indicated that the guideline for federal mail fraud offenses is found at U.S.S.G. §2F1.1, it applied the arson guideline, §2K1.4, in light of §1B1.2 comment. (n.1). That Application Note indicates the appropriate guideline in cases of plea agreements and proceedings. The PSR calculated a base offense level of 24 under §2K.4(a).

Fronko filed an objection to the PSR, arguing that §2K1.4 was inapplicable because there was no plea agreement or proceeding in this case, as required by Section 1B1.2 comment. (n.1). The district court issued a tentative

finding, filed June 10, 1996, sustaining Fronko's objection. The government objected to the tentative finding, arguing that under §2F1.1 comment. (n.13), the PSR properly applied the arson guideline. The district court then issued an amended tentative finding, filed June 21, 1996, adopting the government's position.

With a total offense level of 24 and a criminal history category of I, Fronko had a guideline range of 51 to 63 months. The district court sentenced him to 51 months of imprisonment. Fronko would have been sentenced to a term of 15 to 21 months under the mail fraud guideline.

The district court had jurisdiction pursuant to 18 U.S.C. §3231. We have jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742(a).

II.

On appeal, Fronko argues that (1) the mailing of the medical release authorization form via the United States Postal Service did not further Fronko's scheme to defraud and (2) the district court improperly applied the arson guideline at sentencing when Fronko was convicted of mail fraud.

A.

Fronko argues that the district court erred by finding that the mailing of the medical release authorization form via the United States Postal Service furthered Fronko's scheme to defraud Allstate for the purposes of 18 U.S.C. §1341.

Specifically, the court found that the "reason for requesting the authorizations had to do with [the Allstate employee's] investigation of the claim and determination whether the claim ought to be paid and, therefore, the completed authorization forms were submitted in connection with the attempt to obtain the insurance money . . . ." App. at 45. The court concluded that Fronko "submitted [the authorization form] in pursuit of that claim." Id.

Essentially, Fronko's challenge is to the sufficiency of the evidence with respect to his mail fraud conviction. Accordingly, we view the evidence in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 80 (1942). Moreover, "[w]e must affirm the convictions if a rational trier of fact could have found defendant guilty beyond a reasonable doubt and the verdict is supported by substantial

evidence." United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995).

The mail fraud statute, 18 U.S.C. §1341, provides in relevant part that "whoever, having devised . . . any scheme or artifice to defraud, [and] for the purpose of executing such scheme . . . places in any post office . . . any matter" shall be fined or imprisoned or both. We have found that the "use of the mails need not be an essential element of the scheme" to find liability under 18 U.S.C. §1341. Coyle, 63 F.3d at 1244. The mailing need only be "'incident to an essential part of the scheme.'" Id. (quoting Badders v. United States, 240 U.S. 391, 394 (1916)).

Fronko, relying on Coyle, 63 F.3d at 1244 and United States v. Otto, 742 F.2d 104, 108 (3d Cir. 1984), first argues that the United States mails must play more than an incidental role in a mail fraud case. However, these cases do not support his position. As noted above, a mailing may be incidental as long as it is essential to the fraud, or as long as the scheme's completion is furthered in some way by the mailing.

Second, Fronko argues that the mails were not essential to the fraud. However, Fronko mailed a signed

medical release authorization form to Allstate via the United States Postal Service and his claim might have been denied without that form. At the very least, the mailing of the medical release form to Allstate furthered Allstate's processing of Fronko's claim, an essential part of the scheme. Fronko was seeking to meet all of Allstate's processing requirements, and accordingly to further the likelihood that his claim would be awarded. See generally United States v. Otto, 742 F.2d 104, 108 (3d Cir. 1984) ("it is sufficient if the mailing furthers the scheme or is incident to an essential part of it.") (citing United States v. Adamo, 534 F.2d 31, 36 (3d Cir. 1976)). Thus, there is substantial evidence to support the jury's implied finding that the mailing of that form was part of an essential step in Fronko's scheme to defraud Allstate.

Third, Fronko argues that Allstate already had the information that it requested through the medical release authorization form. This argument is without merit as it has no support in the record. Fronko also argues that the material received by Allstate was of no value. This is irrelevant. Merely by providing the medical release to Allstate, Fronko increased the likelihood that his claim would be paid. Even

routine and innocent mailings are sufficient to trigger the mail fraud statute. Schmuck v. United States, 489 U.S. 705, 714 (1989).

Finally, Fronko argues that because the medical release authorization form could have been hand delivered to him at an examination hearing along with the insurance claim, the mailing was tangential to the fraud. Fronko fails to offer any legal authority to support this argument. In any event, the argument is without merit because Fronko did, in fact, use the mails as part of a fraudulent scheme, which is sufficient to violate the mail fraud statute. 18 U.S.C. §1341 (punishing whoever "places in any post office . . . any matter" for the purposes of executing a fraudulent scheme); see also United States v. Stull, 521 F.2d 687 (6th Cir. 1975) (if mails were used, possibility of hand delivery is immaterial for the purposes of 18 U.S.C. §1341).

B.

Fronko also claims that the district court improperly applied the arson guideline, U.S.S.G. §2K1.4, at sentencing. Because arson was an unindictable offense, Fronko argues, he

should have been sentenced pursuant to the mail fraud guideline. We review a district court's interpretation of the Guidelines de novo. United States v. Thompson, 40 F.3d 48, 50-51 (3d Cir. 1994).

In its amended tentative finding, the district court applied the arson guideline to calculate Fronko's offense level, pursuant to U.S.S.G. §2F1.1, comment. (n.13). That Application Note provides, in relevant part that

> the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than §2F1.1.

Id.

The fact that arson could not have been charged in federal court in this case is irrelevant. See United States v. Pollard, 986 F.2d 44, 47 (3d Cir. 1993). Moreover, a mail fraud sentence should reflect the seriousness of the underlying conduct. See United States v. Day, 943 F.2d 1306, 1311 (11th Cir. 1991) (holding that sentencing court correctly

applied §2K1.4 because a substantial risk of death or serious bodily injury to emergency personnel existed); United States v. DiSanto, 86 F.3d 1238, 1255 (1st Cir. 1996) (same).

Thus, the district court correctly concluded that Fronko's offense was "more aptly covered by another guideline," §2F1.1, comment. (n.13), namely, the arson guideline, §2K1.4.

III.

For the reasons discussed above, we affirm the judgment and sentence imposed by the district court.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

STATUTES INVOLVED

The statute under which Petitioner, James Fronko, was convicted reads as follows:

18 U.S.C. §1341

Section 1341. Frauds and swindles:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects

a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

The statutes under which Petitioner, James Fronko, was sentenced read as follows:

18 U.S.C. Appendix, §2F1.1 comment, note 13	Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States
18 U.S.C. Appendix, §2K1.4(a)(1)	Arson; Property Damage by Use of Explosives